United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1889

To Be Argued By
Joseph W. Burns

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1889

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff-Appellant,

-against-

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, GAZOCEAN U.S.A., JOHN DOE and RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION, the names of the defendants, JOHN DOE, RICHARD ROE, JOHN DOE CORPORATION, and RICHARD ROE CORPORATION being fictitious, their real names and identities presently unknown to the plaintiff,

Defendants,

GAZOCEAN INTERNATIONAL, S.A., GAZOCEAN FRANCE, PETROMAR SOCIETE ANONYME, and MUNDO GAS, S.A.,

Defendants-Appellees.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. Does Rule 41(b) F.R. Civ. P. authorize dismissal of a complaint on the ground that the summons and complaint were served on the moving defendants more than four years after the action was commenced even though there is no showing that the defendants have been prejudiced by the delay, where the cause of action is a conspiracy in violation of the antitrust laws which was still continuing at the time the summons and complaint were served?

2. If a showing of prejudice is required, was it an abuse of discretion to dismiss a complaint where the only activity in the litigation which could possibly be construed as affecting the rights of the moving defendants was a motion by a defendant which was served, attacking the jurisdiction of the District Court over the subject matter, which motion was denied and affirmed on appeal?

3. Where this Court affirmed a District Court order sustaining the jurisdiction of that court, was it a proper basis for ruling that the moving defendants were prejudiced because their attorneys through the act of advocacy might have made a presentation to this Court which could have produced a different result, if they had been in the case?

(a) Was it a proper basis where the attack on jurisdiction was predicated upon a contract between the plaintiff and one of the other defendants, and the moving defendants were not entitled to the benefit of any ruling on the contract and, where

(b) Gazocean U.S.A., which was served in October, 1969, did not join in that motion or participate in the briefs or presentation of the motion in either the District Court or this Court?

6. Was it error to dismiss a complaint under Rule 41(b) where the result was to immunize the moving defendant from plaintiff's claim for damages for violation of the antitrust laws during the four-year period preceding the date of service of the summons and complaint?

7. Was it error to dismiss the complaint as to Gazocean France, and Gazocean International which were part of a group under common ownership with Gazocean U.S.A., which defendant had been served in October, 1969, had been active in the case, and the two moving defendants in the group participated in the conspiracy and had knowledge of this action from the time it was served?

8. Was it error to dismiss the complaint as to Petromar which was an agent for the defendant SAGA, and Mundo Gas, both of whom had knowledge of the commencement of the action, and continued to act thereafter as members of the conspiracy?

II

PRELIMINARY STATEMENT

This is a treble damage antitrust action instituted by Joseph Muller Corporation Zurich on September 25, 1969 against six named defendants. (App. 2)

Defendants Societe Anonyme de Gerance et D'Armement (hereafter "SAGA") and Gazocean U.S.A. were served with a summons and complaint in October, 1969. Defendants-Appellees Mundo Gas, S.A., Gazocean International, S.A., Gazocean France and Petromar Societe Anonyme (hereafter "Petromar") were served by registered mail by the Clerk of the United States District Court on or about December, 1973. (App. 4, 115) Defendants-Appellees are sometimes referred to herein as "these defendants" to distinguish them from the two other defendants.

These defendants moved on February 4, 1974 for an order pursuant to Rule 41(b), Fed. R. Civ. P., for an order dismissing the complaint for failure to prosecute. In an opinion, dated February 25, 1974, Judge Whitman Knapp granted their motions and dismissed the case against them. (App. 119)

Plaintiff moved for the entry of a final judgment and for a certificate pursuant to Rule 54(b), Fed. R. Civ. P. to permit this appeal. A Final Judgment and Rule 54(b) Certificate were signed at a hearing held on June 14, 1974 as to the defendants-appellees, and filed with the clerk on June 24th. The notice of appeal was filed in the District Court on June 25th, and a motion

to expedite the appeal was filed in this Court on June 27th. (App. 118)

This case has been before this Court on another appeal. The defendant SAGA filed a motion to dismiss for lack of jurisdiction of the subject matter. This was denied by Judge Lloyd F. MacMahon on June 23, 1970 (314 F. Supp. 439), affirmed by this Court (451 F. 2d. 727 Nov. 11, 1971), and the petition for a writ of certiorari was denied(406 U.S. 906, April 24, 1972).

A petition for a writ of mandamus is presently before this Court (No. 74-1888) in which SAGA and Gazocean U.S.A. are respondents.

III

STATEMENT OF FACTS

Plaintiff is a substantial Swiss business enterprise which has for many years engaged in worldwide trading in steel and other metals, chemicals, and other raw materials. (Ans. 1a)* This included trade and commerce between the United States and Europe.

In 1967 there was a unique market situation in the world in which there was a surplus of vinyl chloride monomer (VCM) in the United States and a shortage in Europe. VCM is a petrochemical product which is the foundation of much of the modern plastics industry. VCM is converted into polyvinyl chloride (PVC), from which are made countless products such as construction pipes, furniture, upholstery, draperies, wall coverings, floor tiles, tablecloths, toys, clothing, footwear, garden hoses, paints, phonograph records, bottles, imitation leather, and many others.

Plaintiff's extensive experience in trade between the United States and Europe caused it to inquire why this surplus

*In September, 1973, plaintiff filed 68 pages of detailed answers to SAGA's interrogatories. Plaintiff has submitted three copies as Exhibits on this appeal, instead of including them in the Appendix, as plaintiff does not request this Court to read them. They are made available solely as support for the references in this brief. References ("Ans.____)" are to plaintiff's answers to SAGA's interrogatories. A few references in this brief are to the Appendix to the pending petition for a writ of mandamus. These are referred to as ("Pet. App____")

VCM in the United States was not being exported to Europe, where there was an urgent need. Plaintiff learned that there were technical problems in transporting this chemical over long distances such as the Atlantic Ocean as it was very dangerous to handle and there was risk that it would be polymerized during the voyage, causing irreparable damage to both the cargo and the ship. Due to the special requirements of the tankers which would be capable of transporting VCM there were only a limited number of such tankers available in the entire world in September 1968 and these were controlled by SAGA and Gazocean. (Ans. 3, 4, 9c, 17a, 19b)

In 1968 liquefied gas tankers throughout the world were controlled by a few consortia. A very large number of these tankers were owned or controlled by the Gazocean group. The principal units in this group were the three defendants Gazocean France, Gazocean International S.A., and Gazocean U.S.A. There were only nine tankers available in the entire world which were suitable for the business of plaintiff, and four of these were controlled by the Gazocean group. The headquarters of the Gazocean group was in Paris. (Ans. 17, 18, 65. Attached to the Answers is a magazine article describing these consortia.) (App. 106-109)

SAGA was the principal in another international consortium, which in 1970 expanded into a larger consortium called

Multinational Gas & Petrochemical Co. In 1968 SAGA controlled the other five of the nine suitable tankers. Petromar was the agent for SAGA, and negotiated the contract between SAGA and plaintiff. SAGA'S headquarters was also in Paris. (Ans. 20)

The only other company with available tankers which could be adapted to transport VCM was Mundo Gas. Mundo Gas was not in a consortium in 1968 and 1969, but owned several tankers. It operated from London and Bermuda. (Ans. 3, 4, 9c, 17a, 19b)

In September 1968 plaintiff negotiated separately with Gazocean and SAGA for time charters to transport the VCM from the United States to Europe. Each offered a freight rate of $23 per metric ton. (Ans. 16, 18) Plaintiff chose to enter into a contract with SAGA dated October 12, 1968 to transport 17,000 tons with an option for plaintiff to increase this quantity to 25,000 tons if exercised by January 1969. (Ans. 29) Plaintiff conducted extensive negotiations with several U.S. suppliers of VCM, such as Ethyl Corporation (Ethyl) and B. F. Goodrich Company (Goodrich).

Plaintiff was the "pioneer" which took the risk for the historic experimental first shipment on the "TROIKA" in November, 1968. Since plaintiff had developed the technical capacity and know-how, it took the responsibility for determining the proper equipment on the ship, and on the loading docks in the U.S. ports

and unloading docks in European ports. (Ans. 3, 42) The success of this first commercial shipment of VCM across the ocean led the plaintiff to enter into a contract with Ethyl to supply 40,000 to 45,000 tons and a contract with a large French company, Pechiney-St. Gobain to purchase 24,500 tons. (App. 44a, b) Having succeeded with the first shipment, and obtained a supply contract from Ethyl, plaintiff negotiated a new contract with SAGA in December, 1968 to ship up to 50,000 tons at $23.00 a ton. (Ans. 18a)

The success of the venture led plaintiff to seek as much additional shipping capacity as it thought it might be able to use. In January, 1969, it had discussions and communications with Gazocean France and received a telex dated January 29, 1969 offering a price of $33 a ton. (Ans. 18, 35, 41) The first significant document which was evidence of the conspiracy was a telex from SAGA to plaintiff dated February 5, 1969 raising its price of transporting the VCM from $23. to $32. a ton. (Ans. 35) These two telexes indicated to plaintiff that SAGA and Gazocean had reached an agreement on parallel pricing quotations to plaintiff for transporting VCM. This conspiracy between SAGA and Gazocean placed plaintiff in a very difficult position, as it had made contracts to purchase VCM in the United States and deliver to customers in Europe at prices based on the transportation cost of $23. a ton and could not economically pay $32. or $33.

Therefore, it sought other shipowners who owned or controlled ships which were suitable for carrying VCM. This led plaintiff to defendant Mundo Gas which was the only other shipowner capable of carrying VCM in its vessels. On March 17, 1969 Joseph Muller, President of plaintiff, negotiated with representatives of Mundo Gas a contract to transport 25,000 tons of VCM from the U.S. to France for $23. a ton. However, Mundo Gas had a meeting in London with representatives of SAGA on or about May 12, 1969 following which Mundo Gas sent a telex to plaintiff raising its price to $32. a ton. (Ans. 35) Thus, the three companies which together had a monopoly on the available liquefied gas tankers suitable for transporting VCM at economical prices conspired to eliminate plaintiff from this market by agreeing on a price of $32.-$33. a ton which they knew was uneconomical for plaintiff. (Ans. 18, 19, 20c, 33, 45, 50)

When the first evidence of the conspiracy appeared in February, 1969, plaintiff made strenuous efforts to negotiate with the defendants in the hope of terminating their conspiracy. Plaintiff was not interested in a lawsuit, it was interested in avoiding the financial loss being forced upon it by defendants. There is one aspect of this case which is unusual. The conspiracy developed and grew despite the vigilance of plaintiff's American attorneys, Raphael, Searles & Vischi, who were consulted

by plaintiff about the problem as it developed. When the plaintiff's efforts to stop the conspiracy failed, its American lawyers saw what was happening, and recommended instituting this lawsuit to curb the violation, prevent it from recurring, and make the plaintiff whole for its damage. (Ans. 21C, 25, 48, Pet. App. 15) The impact of the violation on plaintiff started during the period January to June 1969, and this action was commenced on September 25, 1969.

The complaint alleges that since at least December 1968 the defendants have been engaged in a continuous conspiracy to have a worldwide monopoly of transportation by special ships, tankers and freighters available for the transportation of such products as VCM, the product involved in this case. It also alleges that the defendants engaged in unfair competition by going to plaintiff's customers and suppliers, whose names they had been given in confidence by plaintiff during the course of their negotiations, and took those customers and suppliers away from plaintiff.

Before the complaint was filed, the defendants offered to transport VCM for customers of plaintiff at lower freight rates than the $32. per ton they demanded from plaintiff. After the complaint was filed they persuaded these customers to deal directly with them as operators of the tankers and to bypass plaintiff. The

defendants then boycotted plaintiff so that it was unable to obtain suitable tankers. This boycott has continued up to the present time. (Ans. 19)

As a result of the pioneering effort of plaintiff in 1968, the exports of VCM from the United States to Europe increased from zero in 1967 to approximately 200,000 tons a year in 1970, 1971, 1972 and 1973. (Ans. 19b, 50, 64b) The defendants took away plaintiff's business, dealt directly with plaintiff's suppliers and customers, and caused millions of dollars in damages to plaintiff.

During 1969 and 1970 plaintiff negotiated sales of VCM to its customers and other new customers covering their requirements of VCM as far ahead as 1975. Attached to plaintiff's memorandum in the Court below is a list of such customers and prospective quantitites. (App. 111) This shows an estimated profit of $24,096,000, all of which was lost.

Once the technical and economic feasib'lity of transporting VCM from the United States to Europe was proven, plaintiff embarked on studies and plans for creating and expanding this market, and expended hundreds of thousands of dollars for feasibility studies, to improve dock facilities in the United States and Europe, and to create plants for additional supplies of VCM. (Ans. 46)

As a result of these studies, on September 16, 1969, plaintiff caused to be organized, Finance & Investment Company, Bermuda, Ltd. for the purpose of constructing in the Caribbean area a huge plant to manufacture VCM and related products. This company had a stock offering of $100,000,000. It obtained loan agreement credit No. E 2777 from the Exim Bank for $80,000,000. Due to the conspiracy by defendants, plaintiff and this company were unable to proceed with their plans for the construction of this big VCM complex, resulting in tremendous losses to plaintiff. (Ans. 24b) At the time the answers to interrogatories were filed in September, 1973, plaintiff submitted detailed calculations of damages caused by the defendants estimated at over $37,000,000 (Ans. 64e), most of which was suffered during the four years preceding the dates on which the summons and complaint was served on these defendants.

The hope of plaintiff and its American attorneys that the commencement of this action in September, 1969 would cause the defendants to end their conspiracy was in vain. Throughout the period that SAGA's appeal was pending, it became evident the the defendants were continuing their boycott. Communications between the plaintiff and its attorneys show the continuation of the conspiracy. (App. 123, 128)

After this Court affirmed Judge MacMahon's decision on

November 11, 1971, plaintiff hoped that the defendants would end their conspiracy, and it endeavored to reestablish contact with them. On December 10 and 14, 1971 Muller wrote to defendants Gazocean France and Mundo regarding a proposal for the transport of VCM from the United States to Europe and sought to obtain from them a storage vessel and a ship. (App. 124-127) There being no response from them, Muller wrote to its New York counsel on December 22, 1971 (App. 128) clearly demonstrating Muller's belief that the conspiracy continued to exist.

IV

ARGUMENT

1. Contentions of Parties in Court Below

The defendants-appellees Gazocean France, Gazocean International, S.A., Petromar Societe Anonyme, and Mundo Gas, S.A., moved to dismiss the complaint against them under Rule 41(b) of the Federal Rules of Civil Procedure on the ground of "lack of prosecution." They contended that the failure to serve the summons and complaint upon each of them until more than four years after the action was instituted on September 25, 1969 constituted such lack of diligence on the part of the plaintiff that the complaint should be dismissed.

Rule 41(b) states as follows:

> "Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Each of the defendants stated that if its motion was not granted, it would file motions attacking the jurisdiction of the District Court over them, the validity of the service of process, and that this would delay the progress of the case against the two defendants who had previously been served, Societe Anonyme de Gerance et D'Armement (SAGA) and Gazocean USA. (App. 32, 64)

Plaintiff contended that while it is the right of any defendant to attack the jurisdiction of the Court over it, the present motion under Rule 41(b) was only a dilatory tactic which had no purpose other than delay. For the four-and-a-half years since this action was commenced on September 25, 1969, co-defendant SAGA had succeeded in delaying all actions by the plaintiff.

In the Court below these defendants contended that this Court's decision in Messenger v. United States, 231 F. 2d 328, (2nd Cir. 1956) and some other cases determined the principle that under Rule 41(b) it was irrelevant whether or not the defendants were prejudiced, that undue delay in serving the summons was by itself sufficient cause for dismissal. However, they recognized that there were decisions holding that there must be a showing of prejudice so they endeavored to demonstrate how they were prejudiced. (App. 36, 52, 70)

With respect to the contention that the issue of prejudice was irrelevant, plaintiff contended that none of the

cases submitted in support of defendants' motions were anti-trust cases or conspiracy cases, and in none were the activity or non-activity of the plaintiff even remotely similar to the instant case. (App. 82)

With respect to the alternative argument that they were in fact prejudiced, plaintiff argued that their contention that they are being dragged into a "stale" case when the four-year statute of limitations would have run is not only legally without validity, but in fact this is a continuing conspiracy, and these defendants have been active participants continuously during the past four years. (App. 82-83, 89-95)

The contention of defendants Gazocean France, Gazocean International, and Petromar, that they have been prejudiced by being deprived of the opportunity to participate in the attack on the jurisdiction over the subject matter by the other French corporation SAGA, is completely without validity, as they conceded the Circuit Court of Appeals did sustain the jurisdiction of the District.

The contention that the delay is prejudicial to these defendants because they were not present during the formative stages of this litigation, and the long delay has deprived them of the opportunity to participate in the preparation of the defense is not substantiated by the record. SAGA has succeeded

in stopping the plaintiff entirely in its efforts to start discovery and the very first stage of defendants' discovery has not yet been completed. Therefore, these defendants are entering the case just at the threshold of discovery, and are no worse off than if they were served at the same time as SAGA and Gazocean U.S.A.

To these defendants' contention that a dismissal would save the District Court from having the progress of the case delayed, plaintiff responded that these four defendants will have to be subjected to discovery by the plaintiff whether or not they are active parties in the litigation. It will be necessary to take their depositions and to request documents from each of them since they are active participants in the conspiracy. Accordingly, having them become active parties to the litigation will not adversely affect the progress of the case but on the contrary will expedite it as it will be much simpler to obtain discovery of these defendants when they are parties, than if they are third parties as in the latter capacity they will be able to engage in further obstructionist tactics. (App. 104-105)

2. Delay In Serving the Summons And Complaint On Some Defendants Does Not In And Of Itself Constitute Lack of Prosecution Under Rule 41(b)

The Court below based its decision on two grounds. First, it found that these defendants were prejudiced by their

inability to directly participate in SAGA's jurisdictional attack in spite of the fact that:

> "plaintiff's failure to serve these defendants did not prevent them from appearing in the action (of which they were aware) and participating in the attack on subject matter jurisdiction." (App. 116)

Second, it found that the plaintiff had not produced the slightest rational excuse for its more than four-year delay in effecting service on these defendants, and, therefore, the case was covered by this Court's decision in Messenger v. United States supra, where Judge Medina said: (p. 331)

> "The operative condition of Rule 41(b) is lack of due diligence on the part of the plaintiff - not a showing by the defendant that it will be prejudiced by denial of its motion."

Defendants' contention that mere delay in and of itself constitutes "lack of due diligence" authorizing a court to dismiss is not supported by any of the cases they cite. Although F.R. Civ. P. 41(b) grants the Court authority to dismiss a plaintiff's action for lack of due diligence in its prosecution, District Courts are reluctant to deny plaintiffs their day in court under this rule.

In Richman v. General Motors Corporation, 437 F. 2d 196, 199 (1st Cir. 1971) the Court stated: "Dismissal is a harsh sanction which should be resorted to only in extreme cases." It cited with approval Durham v. Florida East Coast Ry. Co.

385 F. 2d, 366, 368 (5th Cir. 1967) where Judge Wisdom stated:

> "[t]he sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion.' Durgin v. Graham, 1967, 5th Cir., 372 F. 2d 130, 131. The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the fact of a clear record of delay or contumacious conduct by the plaintiff."

In each case cited by these defendants in their briefs below, the plaintiff had either voluntarily failed to comply with the rules of the Court or was guilty of contumacious conduct. For example, plaintiff deliberately disregarded known procedure, Messenger v. United States, supra., Campbell v. Plavchak, 21 FRD 41 (E.D. Pa. 1957); plaintiff remained absolutely inactive for a period of two to nine years, Spering v. Texas Butadiene & Chemical Corp. 434 F. 2d 677, (3rd Cir. 1970), S & K Airport Drive In Inc. v. Paramount Film Distributing Corp. 58 FRD 4 (E.D. Pa. 1973), States Steamship Co. v. Philippine Air Lines, 426 F. 2d 803 (9th Cir. 1970); plaintiff himself was the cause of the delay, Taub v. Hale, 355 F. 2d 201 (2nd Cir. 1966), Redac Project 6426 Inc. v. Allstate Insurance Co., 412 F. 2d 1043 (2nd Cir. 1969); plaintiff neither directly nor indirectly informed defendant of the damages, and defendant had no means of knowing the damage, Richardson v. U.S. Shippping Co., 38 FRD 494 (N.D. Cal. 1965), Howmet Corporation v. Tokyo Shipping Co., 318 F. Supp. 658 (D. Del. 1970); plaintiff offers absolutely no reason for the

delay, Dewey v. Farchone, 460 F. 2d 1338 (7th Cir. 1972), Durst v. National Casualty Co., 452 F. 2d 610 (9th Cir. 1972).

In Messenger there was "[f]or some six years...a complete lack of any prosecutory effort; not even service of the action has been accomplished." This court held that it would have been a "gross abuse of discretion to make a finding of excusable neglect nor would such a finding be of avail to plaintiff in the absence of service upon the Attorney General."

But this court also stated that a reasonable or excusable delay would not bar a plaintiff's action.

No court decision has ruled that there is any particular time or period after an action has been commenced when the summons and complaint must be served, or the complaint will automatically be dismissed. There is no rational basis upon which the rule sought by the defendants-appellees can be sustained, i.e., that a delay of 50 months automatically constitutes a failure to prosecute, warranting the dismissal of the case, and freeing the defendants from all liability.

These defendants were served with the summons and complaint 50 months after the action was commenced. Gazocean U.S.A. and SAGA were served the first month after the action was commenced. There is no way courts can pick a date between the first month and the fiftieth month when dismissal is justified automatically.

Since the purpose of the Rules, as well as all law, is to be fair to all parties, the Court must consider the nature of the case, all the circumstances of the litigation, and whether the delay prejudiced the defendants.

No precise rule can be laid down as to what circumstances justify a dismissal for failure to prosecute but the procedural history of each case must be examined in order to make such determination, with the trial judge remaining ever mindful that policy of the law favors the hearing of litigant's claim upon the merits. Davis v. Operation Amigo Inc., 378 F. 2d 101 (10th Cir. 1967)

3. Considering The Nature And Circumstances Of This Case There Was No Lack Of Due Diligence in Prosecuting the Case

The nature of this case, and the record of activity since the action was instituted in September, 1969 preclude any holding that the plaintiff was guilty of lack of prosecution.

It is most important that this Court recognize, as plaintiff must constantly emphasize, that none of the cases citedby these defendants below, and none that plaintiff could find, were concerned with a continuing conspiracy to violate the antitrust laws. The nature of the claim for relief in this case is entirely difference from those in cases cited, which concerned a long delay in prosecution after the cause of action was complete.

The complaint alleged violations of Sections 1 and 2 of the Sherman Act, setting forth in detail the monopolistic position in the liquefied gas tanker transportation market of the defendants SAGA and the Gazocean group, their conspiracy to charge parallel prices for freight, their boycott of the plaintiff, and their continuous conspiracy in restraint of U.S. export trade.

The continuing nature of the violations was established in the answers plaintiff served to SAGA'S interrogatories in September, 1973. In these answers the plaintiff pointed out that the defendants had continued their boycott by refusing to charter ships to it, had continued to deprive it of customers and do acts of injury to it throughout 1971, 1972 and 1973. (Ans. 18a, 19b, 20c, 33, 45, 45(b), 50) The success of the defendants in establishing and maintaining a monopolistic position is verified by an independent economic report published in February 1973. (App. 106)

At the time the summons and complaint were served in December, 1973, plaintiff could have filed and served a new complaint upon the moving defendants, and the only difference would have been that plaintiff would have been limited by the four-year statute of limitations (15 U.S.C. §15b) to damages for acts committed after November, 1969. The effect of the dismissal may be to bar plaintiff from pursuing its cause of

action against these defendants entirely - and allow them to get off free.

Plaintiff has alleged that the earliest known date of the commencement of the antitrust violations by the defendants was January 1969. Assume two hypothetical situations. (1) If it had not been a continuing violation, it could have commenced the action against all six defendants in January, 1973, and have the right to collect for all damages suffered. (2) Since it is a continuous violation, it could have commenced the action against all six defendants for the first time in December, 1973, and the only effect would have been to bar damages which occurred during the year 1969.

The Court below erred in failing to distinguish the facts in the Messenger case from the entirely different situation presented in the instant case, and the policy which this Court was endeavoring to enforce. In Messenger, one defendant was the United States of America. The plaintiff there served the United States Attorney for the Eastern District of New York but failed to serve the Attorney General as required by Rule 4(d) Fed. R. Civ. P. The statute of limitations there involved was a two-year statute which clearly had expired as to the entire cause of action and absolved the United States from liability

if the complaint was served at the time the motion was filed. The injury there involved was not a continuing wrong as in this case.

The difference between a cause of action under the Tort Claims Act, which was complete at the date the complaint was filed, and the kind of antitrust action involved in the instant case is illustrated in Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 501 (1968), where the Supreme Court stated regarding the application of a statute of limitations to an antitrust action:

> "United has also advanced the argument that because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected United's argument in its supplemental opinion. We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Cf. Emrich Motors Corp. v. General Motors Corp. 229 F. 2d 714 (CA 7th Cir. 1956), upon which United relies. Rather we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955." (Emphasis supplied.)

This demonstrates that this present action could have been instituted against these four defendants in December, 1973. It is not a stale case as to them and no long period of time has elapsed since the cause of action arose, a significant difference between this case and all other cases cited by defendants below in which dismissal was granted.

The Court below gave no consideration to the evidence presented by appellant to demonstrate that the cause of action was a continuing one. But it is appropriate for this Court to know about that evidence in determining whether there was a misuse of Rule 41(b).

On December 10 and 14, 1971, plaintiff wrote to Gazocean France (App. 124, 126) regarding its proposal for the transport VCM from the United States to Europe and sought from it a storage vessel and a ship. These documents were provided to the Court below in connection with the dismissal motion. Gazocean's refusal of the offer is an example of an overt act for which a cause accrued after the filing of Muller's complaint.

Plaintiff similarly wrote to Mundo on those dates, December 10 and 14, 1971. (App. 125, 127) Mundo's refusal of the offer is an example of an overt act for which a cause accrued after the filing of Muller's complaint.

Plaintiff's letter to its New York counsel dated December 22, 1971 (App. 128) clearly demonstrate's plaintiff's belief that the conspiracy continued to exist at that time.

Certainly after the complaint was filed Gazocean France, Gazocean International, Mundo and Petromar were aware that this action was in progress. Plaintiff supplied to the Court below the only evidence which it could reasonably be

expected to have in an action asserting a continuing conspiracy in violation of the antitrust laws - its letters of December 1971 to these defendants. They were by then on notice of the pendency of this action and obviously were careful not to provide additional direct evidence to plaintiff. In the cirumstances, their failure to reply to plaintiff's letters was consistent with plaintiff's belief that they were even then participants in a continuing antitrust violation. Moreover these defendants offered no explanation to the Court below for their failure to reply to plaintiff's letters that was inconsistent with plaintiff's contention. In the absence of discovery by plaintiff from them it is unreasonable to expect more specific information as to their continued participation in the conspiracy.

But plaintiff also offered an independent opinion - of an economic report by H. P. Drewry Ltd., London, which actually described the continuing conspiracy in terms almost parallel to the allegations of the complaint which specifically described the monopolistic conduct of SAGA, the Gazocean group and Mundo. (App. 106)

Plaintiff submits that the Court below did not clearly focus upon the effeet of its blanket ruling in favor of these four defendants. The dismissal by the court below under Rule 41(b) operates as an adjudication upon the merits since the Court in its order did not otherwise specify.

Where the nature of the case is such that the cause of action was complete when the complaint was filed, a dismissal under Rule 41(b) terminates the plaintiff's rights, and he cannot file a new complaint even though he is within the statute of limitations. But that cannot be the rule in an antitrust case such as this which is a continuing offense.

The danger in the decision appealed from is that these defendants will try to contend it is res judicata against a new complaint.

The defendants contended in the Court below that the statute of limitations would have run if the plaintiff had attempted to file a new complaint now, and therefore they should not be held under the original complaint which was filed in time. The first answer to this contention is that a defendant does not have a right to raise the statute of limitations as an objection simply because it was served with the summons after the statutory period may have run, where the complaint was in fact filed within the time period. Lippasco v. Levey, Inc., 305 F. Supp. 175 (D.C. Vt. 1969) Second, the defendants have no support at all for the contention that the statute of limitations would have run if the action had just been commenced.

Plaintiff as a matter of policy and as a matter of law should be permitted to at least attack the conduct of these

defendants within the period of the antitrust statute of limitations for four years preceding the date of service of service of the summons and complaint upon these defendants.

The Supreme Court in Zenith Radio Corp. v. Hazeltine Research 401 U.S. 321, 338 (1971) has recently stated regarding the four-year limitation period for civil antitrust actions:

> "Generally a cause of action accrues and the Statute begins to run when a defendant commits an act that injures a plaintiff's business....This much is plain from the treble-damage statute itself...In the context of a continuing conspiracy to violate the anti-trust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act...[E]ach separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial." (Emphasis supplied.)

Under the complaint which was dismissed, plaintiff had the right to amend it just prior to trial to allege the continuation of the violation up to that time. The effect of the decision below may be to cut off plaintiff's claim for acts of the defendants subsequent to the filing of the complaint. As has been stated above, plaintiff could have filed a new complaint charging the same offense for the period after December 1969, instead of serving the summons and the present complaint.

This Court should not permit the judgment of dismissal to stand and create additional confusion, which will result if plaintiff is compelled to file a new complaint, and these defendants contend that the present judgment under review is res judicata.

Plaintiff will now discuss the circumstances of this case, and demonstrate that there was no lack of prosecution. This is not a case where there has been lack of activity. At the outset of the litigation the defendant SAGA filed its motion to dismiss which delayed all activity for two-and-a-half years until the Supreme Court denied its petition for a writ of certiorari. Then SAGA embarked on a program intended to delay progress of the case by repeating motions for security for costs, and discovery motions. The result is that when the Court below dismissed the case, plaintiff had not even begun discovery, and only one defendant had entered the very first stage of its discovery. (Pet. p. 3, 4, 22, 23)

There is now pending before this Court plaintiff's petition for a writ of mandamus whose purpose is to obtain this Court's aid in permitting it to <u>start</u> discovery.

Due to SAGA's efforts contesting the jurisdiction of this Court, it did not answer the complaint until May 7, 1972 nearly three years after the action had begun. Two months later,

in July, when counsel for the plaintiff suggested a schedule for the taking of depositions of former SAGA employees in Europe, SAGA's counsel took the position that SAGA should take the deposition of the president of plaintiff Joseph Muller and his employees first. From July 1972 until the present, SAGA's counsel has been able to maintain that tactical position. He did not serve any notice to take depositions of plaintiff until February 7, 1973, yet the first deposition has not yet been taken because he insisted on having answers to written interrogatories and the production of documents for inspection before he commenced the taking of the depositions. SAGA's counsel served the interrogatories and a Request for Production of Documents in July 1973. Unlike the plaintiffs in Dewey v. Farchone, supra, and States Steamship Co. supra, cited by defendants, voluminous responses were made by the plaintiff in September, but instead of proceeding to take the deposition of Joseph Muller, president of plaintiff, SAGA's counsel obtained an order to show cause on October 4, 1973 to dismiss the complaint for failure to make proper responses or in the alternative to require further responses.

Since the plaintiff's delay is due, not to a disregard of judicial procedure, but rather complaince with the judicial procedure invoked by SAGA; not to the plaintiff's absolute

inactivity, but rather to extreme activity necessitated by SAGA's requests; not to a delay caused by the plaintiff, but rather a delay caused by SAGA; it was error for the Court below to invoke the harshness of F.R. Civ. P. 41(b) to deny plaintiff's plea for damages.

Courts have generally recognized that even if service of process is delayed, a motion to dismiss will be denied if the defendant has knowledge of the plaintiff's asserted damages. Howmet Corporation v. Tokyo Shipping Co., supra. In the instant case, the plaintiff's answers to SAGA's interrogatories and the documents submitted in response to its request for production of the documents supply evidence substantiating the allegations of the complaint. They show that all of these defendants have intimate knowledge of the case and its progress from its inception.

The Court below found that these defendants were aware of the action when it was instituted. Certainly, plaintiff knew they knew, and even thought they were all parties to the action. In the letter from plaintiff to its attorney dated December 22, 1971, one of its employees stated:

> "Mr. Joseph Muller asked me recently to send out inquiries for freight offers to Messrs. Mundogas and Gazocean in order to see whether these companies are now willing to quote us competitive freight rates after they also lost their appeal before the U.S. Court of Appeal in New York."

This Court assumed that the District Court's ruling denying SAGA's motion to dismiss was appealed by the Gazocean group, stating: (451 F.2d 729) "and appellants Gazocean International, S.A. and Gazocean France, have jointly-owned subsidiary, Gazocean, U.S.A., a New York corporation, that is likewise engaged in business in the United States."

Gazocean France and Gazocean International are part of the same corporate family as the defendant Gazocean U.S.A. These three corporations have some common officers and it cannot be stated with any sense of accuracy that each of these corporations was not completely familiar with all of the proceedings which have taken place in this Court from the beginning. They all knew that the complaint was filed and that they were named as defendants.

The evidence shows that Petromar was the agent for defendant SAGA, and was an intimate part of all of the transactions which are the basis for the plaintiff's contention that there was a conspiracy in violation of the antitrust laws. As agent for SAGA it is fully familiar with the fact that this complaint was filed and all the proceedings which have taken place. Mundo Gas has admitted it had knowledge of this case naming it as a defendant.

4. The Delay Has Not Prejudiced These Defendants

These defendants contended below that they will be prejudiced because (1) they were not present during the formative stages of the litigation, and (2) they have been deprived of an opportunity to participate in the preparation of their defense.

Due to the delaying and dilatory tactics of the defendant SAGA, none of these points raised by these defendants are valid. As explained above, SAGA has succeeded in delaying the start of any discovery by the plaintiff. Even the first step in the way of discovery has not been completed. These moving defendants are coming into the case at the very threshold of the commencement of discovery by any party. Their contention that they will be prejudiced because they were not present during the formative stages of this litigation cannot be substantiated.

The only activity in the case which the Court below could find where it felt the delay prejudiced these defendants was the motion to dismiss filed by SAGA. Plaintiff calls attention to several fallacies with respect to this holding.

First, this Court does not need argument from plaintiff's counsel to help it determine whether it feels these defendants were hurt because their counsel might have been more persuasive

than SAGA's counsel, and caused this Court to reach an opposite opinion to what it stated in 451 F. 2d 727. Nevertheless, reading this Court's opinion justifies the conclusion that the issue decided was one of law, where no facts were concerned, and any Court of Appeals would have come to the same conclusion.

Second, if the Franco-Swiss treaty was held to protect SAGA from a suit in the United States Courts, it would have been due to the fact that there was a contract between plaintiff and SAGA to which the treaty was applicable. Such a holding could not have benefited these defendants who were not parties to that contract.

Third, the defendant Gazocean, U.S.A had been served, knew about the motion, and yet its counsel did not participate in the motion in either the District Court or this Court. And the Counsel for Gazocean France and Gazocean International are the same as for Gazocean, U.S.A.

Fourth, Mundo Gas is neither a French or Swiss Corporation so the decision could not have benefited it.

The District Court did not mention any other ground for its holding that these defendants were prejudiced. These defendants did urge another ground in the Court below, contending that since the statute of limitations would have barred a new complaint in December, 1973 (under their erroneous conception of the cause of

action), they were prejudiced by being required to meet a "state" claim. This point has been fully covered above where the nature of the continuing conspiracy was discussed to show the inapplicability of the Messenger and other cases to the instant case.

V

CONCLUSION

The judgment of the District Court should be reversed. In view of the nature of this case and the circumstances of the litigation it was an abuse of discretion to dismiss the complaint under Rule 41(b) on the ground of lack of prosecution. It was error as matter of law to dismiss the complaint, if the effect of the judgment could be construed as cutting off plaintiff's claim with respect to all causes of action which accrued within the four-year period preceding the service of the complaint on each defendant.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff-Appellant,

-against-

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, et al.,

Defendants,

GAZOCEAN INTERNATIONAL, S.A., et al.,

Defendants-Appellees.

- x

No. 74-1889

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

SUSAN SILVER, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1573 East 10th Street, Brooklyn, N. Y.

That on the 3rd day of July, 1974 deponent served two copies of Appellant's Brief and Appellant's Appendix upon Donovan, Leisure, Newton & Irvine, 30 Rockefeller Plaza, New York, N. Y.

Sworn to before me this

3rd day of July, 1974.

Kathleen P. Gannon

KATHLEEN P. GANNON
Notary Public, State of New York
No. 24-6455000
Qualified in Kings County
Commission Expires March 30, 1976

Susan Silver

Susan Silver

UNITED STATES COURT OF APPEALS
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JOSEPH MULLER CORPORATION ZURICH,

Plaintiff-Appellant,

No. 74-1889

-against-

AFFIDAVIT OF SERVICE

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, et al.,

Defendants,

GAZOCEAN INTERNATIONAL, S.A., et al.,

Defendants-Appellees.

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

MIRIAM SCHWIMMER, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1364 58th Street, Brooklyn, N. Y.

That on the 3rd day of July, 1974 deponent served two copies of Appellant's Brief and two copies of Appellant's Appendix upon Fried, Frank, Harris, Shriver & Jacobson, Esqs., 120 Broadway, New York, N. Y. and Sullivan & Cromwell, Esqs., 48 Wall Street, New York, N. Y.

Sworn to before me this 3rd day of July, 1974.

Florence R. Le Sauvage

FLORENCE R. LE SAUVAGE
Notary Public, State of New York
No. 31-2317150
Qualified in New York County
Commission Expires March 30, 1975

Miriam Schwimmer

Miriam Schwimmer